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Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of)	MM Docket No. 88-577
)	
LIBERTY PRODUCTIONS,)	File No. BPH-870831MI
A LIMITED PARTNERSHIP)	
)	
Et. Al.)	
)	
For Construction Permit for		
New FM Channel 243A		
Biltmore Forest, North Carolina		

To: The Commission

REPLY

Liberty Productions, a Limited Partnership ("Liberty") by counsel herewith submits its reply to the Enforcement Bureau's (the "Bureau") Comments, filed in the above proceeding on February 14, 2000, as follows:

1. Liberty appreciates the Bureau's impartial and objective consideration of the record, as reflected in its Comments. Liberty submits the following comments in response.

Absence of Certification.

2. The Bureau concludes (para. 18) that the absence of the certification regarding the interests of immediate family members is of no consequence. As the Bureau notes, the certification at issue is not required by the Rules. The Bureau also confirms that the Mass Media Bureau's practice has been to require such a certification where it appeared that immediate family members

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held media interests that potentially could be attributable. This was and remains Liberty's understanding: that the certification was not required, inasmuch as none of its general partner's family members hold any interest, attributable or otherwise, in any medium of mass communications. See: Liberty's Opposition to BFBFM's Motion to Enlarge, filed November 26, 1999, at para. 4.

3. In any event, the Commission accepted Liberty's application for filing, without requiring any curative amendment. Public Notice (DA 99-1800), released September 3, 1999. That determination represents a final and nonappealable action of the Commission. No timely request for reconsideration of that action was filed and the Commission did not set aside that action, taken pursuant to delegated authority, within the time allotted. See: 47 CFR 1.102(b), 1.106, 1.108, 1.115.

4. Even were that action not final, Liberty would be entitled to cure any such deficiency by amendment. First Report and Order (FCC 98-194), released August 18, 1998, at para. 145. Pursuant to 47 CFR 1.2105(b), only the omission of the information required to be included by 47 CFR 1.2105(a) would result in the application being found unacceptable. In Broadcast Auction 25 deficiency letters were sent to 99 applicants, who were accorded an opportunity to amend their short-form applications. Public Notice (DA 99-1800), released September 3, 1999, at page 2.

Acceptability of Amendment.

5. The Bureau correctly observes (para. 21-22) that the applicable Rule does not authorize the filing of "oppositions" to long form applications and that reasonable assurance of site availability is no longer a prerequisite. In addition, it should be emphasized that the good cause showing, previously required to support amendment of an application, has been eliminated. See: 47 CFR 73.3522.

Site Certification Issue.

6. Liberty's disagrees with the Bureau's characterization (para. 31) of its site certification as "imprudent". It is well established that what an applicant is required to do is:

- (a) contact the property owner or owner's agent and
- (b) obtain "reasonable assurance in good faith that the proposed site will be available for the intended purpose." Processing of FM and TV Broadcasting Applications, 58 RR2d 776, 782 (1985). (emphasis added) The assurance need only be "sufficient" to "justify" the applicant's good faith "belief" that the site will be available. Puopolo Communications, Inc., 60 RR2d 964 966 (RB 1986)

7. Here, as the Bureau concluded, Klemmer clearly believed that she had reached a tentative agreement with Vicky Utter, which included all of the elements necessary to support a certification of site availability, as she understood them. That belief is sufficient to preclude any finding of intentional

deception. Whether Liberty had reasonable assurance depends upon whether or not Klemmer's "belief" that the site would be available on the terms discussed with Utter was held in "good faith". Commission precedent suggests that it was. National Innovative Programming Network, Inc., 2 FCC Rcd. 5641, 5643 (1987)

8. The Bureau observes (para 31) that nothing in the record supports the conclusion that Orion would have constructed a tower on Vicky Utter's property, if it were not the successful applicant. In fact, the record precludes such a conclusion, inasmuch as both Vicky Utter and Brian Lee confirmed that Lee would have no use for the site, if Orion were unsuccessful. Liberty Ex. 13, p. 14; Tr. 2480.

Bidding Credit.

9. The Bureau contends that Liberty is not entitled to the New Entrant Bidding Credit, due to the fact that it entered into a loan agreement with Cumulus Broadcasting, Inc. on September 10, 1999. The Bureau contends that an amendment to the Commission's rules that became effective prior to the short-form filing deadline resulted in Cumulus's media interests being attributable to Liberty, as of the date of the loan.

10. As the Bureau notes, Liberty disclosed the loan agreement with Cumulus, that it would exceed 33% of Liberty's total debt and equity and that Cumulus had other media interests that would otherwise have been attributable to Liberty. Liberty

does not dispute the fact that the amended rules became effective on August 19, 1999, prior to the auction. In fact, as the Bureau notes (at para. 16 and Note 30) Liberty utilized the formula specified in the new rules in determining that its limited partner's interest was not attributable. Instead, Liberty has consistently contended that it was eligible for the New Entrant Bidding Credit on August 20, 1999, the short-form filing deadline, the date upon which its eligibility was to have been determined, in accordance with Public Notice (DA 99-1346), released July 9, 1999.

11. The Bureau acknowledges (para. 7) that the July 9, 1999 Public Notice did provide that in determining an applicant's eligibility for the New Entrant Bidding Credit its "attributable interests would be determined as of the short-form filing deadline." Public Notice (DA 99-1346), released July 9, 1999, page 8. (emphasis added) The clear and unequivocal pronouncement of the July 9, 1999 Public Notice is that Liberty's entitlement to the New Entrant Bidding Credit must be determined as of August 20, 1999.

12. Liberty held no attributable media interests, as of August 20, 1999. The Bureau does not claim otherwise. Instead, the Bureau contends that Liberty lost its eligibility at the time it entered into the loan agreement with Cumulus, relying primarily on Public Notice (DA 99-1912), released September 17, 1999. The Bureau believes that the September 17, 1999 Public Notice required applicants to report all changes in attributable

interests after the short-form filing deadline and in this instance required the Mass Media and Wireless Bureaus to eliminate Liberty's Bidding Credit, based upon the fact that it had entered into a loan agreement with Cumulus, subsequent to August 20, 1999. The Bureau acknowledges (para. 11) that Liberty disclosed sufficient information to allow the Mass Media and Wireless Bureaus to make a determination regarding its entitlement.

13. The Bureau attempts (para. 34) to reconcile the provisions the July 9, 1999 and the September 17, 1999 Public Notices. It suggests that, when read together, they provide that an applicant's entitlement to the New Entrant Bidding Credit is frozen, as of the short-form filing deadline, unless the applicant's attributable interests increase, in which case the bidding credit would be diminished or eliminated, subsequently. While this effort at reconciliation is facially appealing, it ignores a number of problems.

14. First, the July 9, 1999 Public Notice was clear and unequivocal in stating that a bidder's entitlement to the New Entrant Bidding Credit would be determined as of the short-form filing deadline, not at some later date and not on an ongoing basis. Furthermore, this pronouncement was not limited to the context of the July 9, 1999 Public Notice, it also was made in public notices governing the conduct of at least two subsequent broadcast auctions. Thus, long after the September 17, 1999 Public Notice had been issued, the Commission continued to advise

prospective bidders emphatically, unequivocally and without any qualification, whatsoever, that their entitlement to the New Entrant Bidding Credit would be determined on the basis of attributable interests they held, as of the short-form filing deadline. If entitlement to the credit was subject to re-evaluation, based upon the September 17, 1999 Public Notice, as the Bureau contends, then the Commission seriously mislead potential bidders in subsequent auctions.

15. Thus, Public Notice (DA 99-2585), released November 19, 1999, Attachment C, at page 2, stated: "The bidder's attributable interests shall be determined as of the short form (FCC Form 175) filing deadline." Nothing in Attachment C provided any suggestion that entitlement to the New Entrant Bidding Credit would be re-evaluated at a later date, based upon subsequent circumstances. Likewise, Public Notice (DA 99-2958), released December 23, 1999, at page 13, affirmed in bold type that: "The bidder's attributable interests shall be determined as of the short-form (FCC Form 175) filing deadline--February 18, 2000." Again, nothing suggested the possibility that a bidder's entitlement to the New Entrant Bidding Credit would be re-determined at a later date.

16. Secondly, the September 17, 1999 Public Notice (DA 99-1912) spoke in terms of "ownership changes," not changes in attributable interests. Liberty had not experienced any ownership changes that would negatively impact its position and, thus, considered these provisions inapplicable to its situation. Given

the Commission's continued practice of advising potential bidders that their entitlement to the New Entrant Bidding Credit will be determined as of the Form 175 filing deadline, it would appear that Liberty's interpretation of that Public Notice was accurate. Adoption of the Bureau's position would substitute uncertainty and confusion for the bright line approach adopted in the July 9, 1999 Public Notice.

17. Finally, the Bureau's analysis ignores the fact that the July 9, 1999 Public Notice represented a final action of the Commission, taken pursuant to delegated authority. Actions taken pursuant to delegated authority are effective upon release of notice thereof to the public. See: 47 CFR 1.102(b). No petition for reconsideration or application for review was filed nor did the Commission set aside the action on its own motion within the allotted time. See: 47 CFR 1.102(b), 1.106, 1.108, 1.115. Accordingly, the July 9, 1999 Public Notice constitute a final action of the Commission and is no longer subject to reconsideration or review.

18. The Bureau observes (para. 11 and Note 26) that Liberty did not address the impact of the September 17, 1999 Public Notice in the September 27, 1999 amendment to its Form 175 and failed to send "summary letters". As discussed above, the September 17, 1999 Public Notice addressed "ownership changes", not non-ownership related changes in attributable interests, and Liberty had not experienced any ownership changes. In any event, the Commission's acceptance of Liberty's Form 175 for filing,

despite the alleged deficiencies, reflects a final action, no longer subject to reconsideration or review. Nevertheless, even if that action were not final, Liberty would have been entitled to amend to remedy any minor deficiency. See para. 4, supra.

19. The Commission should take action to clarify the issue of the impact in changes in an applicant's attributable interests, subsequent to the short-form filing deadline. However, any revised policy in this regard should not be applied retroactively to applicants, such as Liberty, who filed their Form 175 applications on the basis that their entitlement to the New Entrant Bidding Credit would be determined as of the filing deadline in reliance upon the July 9, 1999 Public Notice (or the November 19, 1999 and December 23, 1999 Public Notices).

Respectfully Submitted

LIBERTY PRODUCTIONS,
A LIMITED PARTNERSHIP

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February 29, 2000

CERTIFICATE OF SERVICE

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